REDACTED – FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. §160(c) to Accelerate Investment in Broadband and Next-Generation Networks	)	WC Docket 18-141

COMMENTS OF CALTEL

[PUBLIC VERSION]

Sarah DeYoung
Executive Director, CALTEL
50 California Street, Suite 1500
San Francisco, CA 94111
Telephone: (925) 465-4396
Facsimile: (877) 517-1404
Email: deyoung@caltel.org

Stephen P. Bowen
Bowen Law Group
19660 North Rim Drive, Suite 201
Surprise, AZ 85374
Telephone: (415) 394-7500
Facsimile: (415) 394-7505
Email: steve.bowen@bowenlawgroup.com

Counsel for CALTEL

August 6, 2018

TABLE OF CONTENTS

I. Introduction and Summary 4

II. DISCUSSION 10

A. UNEs and Section 251(c)(4) Resale Play an Important Role in Enabling Competition and Competitive Choice in California 10

1. Use of UNEs and Resale in California 10

2. Key Trends and Conclusions in the Petition and Appendix B Are Counter to The Reality for California 18

3.The CPUC's 2016 Competition Analysis Discussed the Role of UNEs and the Inter-relationship of Reliance on UNEs to Other Competitive Bottlenecks, Especially Access to Utility Poles 24

4.State-Specific Barriers to Deployment of Last-Mile Fiber Loops Is a Key Factor in Determining the Competitive Impact of Eliminating UNEs 29

5.The Commission's Existing Rules, Including Rules Governing Copper Retirement, Incorporate a Natural Elimination of Unbundling Obligations for DSO Loops 35

B. More Information is Needed to Assess the Impacts of USTelecom's Request for Forbearance from the Obligations of Section 271(c)(2)(B)(iii) 38

III. CONCLUSION 41

APPENDIX A 43

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of USTelecom for Forbearance Pursuant	)	WC Docket 18-141
to 47 U.S.C. §160(c) to Accelerate Investment in	)	
Broadband and Next-Generation Networks	)	

COMMENTS OF CALTEL

Pursuant to the Commission's Order granting a 60-day extension of time to file comments on the USTelecom Petition,[1] the California Association of Competitive Telecommunications Companies[2] ("CALTEL") files the following comments on behalf of its members.[3]

[1] *Order*, DA 18-574, June 1, 2018, ("*USTelecom Forbearance Extension Order*").

[2] CALTEL is a non-profit trade association working to advance the interests of fair and open competition and customer-focused service in California telecommunications. Most The majority of CALTEL members are entrepreneurial companies building and deploying fiber networks to provide competitive voice and broadband services. The majority of CALTEL members are small businesses who help to fuel the California economy through technological innovation, new services, affordable prices and customer choice.

[3] *See* www.caltel.org for a list of CALTEL member companies. CenturyLink is a member of CALTEL but is also a member of USTelecom. Century Link does not support CALTEL's position on the USTelecom forbearance petition.

I. Introduction and Summary

On May 4, 2018, USTelecom filed a petition ("USTelecom Petition" or "Petition")[4] pursuant to Section 10 of the 1996 Telecom Act ("Act") requesting that the Commission forbear from the following requirements:

1. Obligations of all ILECs to provide unbundled network elements ("UNEs"), and resale at wholesale rates, regardless of geographic market, market segment, market-specific availability of commercial alternatives or market-specific impact on competitive choice, pursuant to Sections 251(c) and 252;
2. RBOC obligations pursuant to the affiliate requirements found in Section 272(e)(1) and Section 64.1903 of the Commission's rules; and
3. RBOC obligations regarding access to poles, ducts, conduit and rights-of-way pursuant to Section 271(c)(2)(B)(iii).

With regard to the first request, CALTEL strongly opposes USTelecom's unprecedented request to grant *all* ILECs in *all* geographic markets and *all* market segments forbearance from the requirements to provide *all* UNEs and services for resale at wholesale rates pursuant to Section 251(c). In the 2009 Forbearance Procedures Order the Commission noted that "in the first several years after enactment of the statutory forbearance provisions, parties requested relatively specific forbearance relief" and that "more recently, however, forbearance requests have become increasingly complex, and the requested relief has become increasingly broad."[5] Nine years later, this newest of USTelecom's forbearance requests is over-the-top broad, affecting hundreds of

[4] *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next Generation Networks,* WC Docket 18-141, dated May 4, 2018.

[5] *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended,* WC Docket No. 07-267, Report and Order, dated June 29, 2009, at ¶6 ("*Forbearance Procedures Order*").

competitive carriers and millions of residential and business customer lines. It is also exceedingly complex, at least in terms of subject matter (although not in terms of the simplistic analysis that USTelecom has thus far performed), affecting millions of UNEs that differ state-to-state and ILEC-to-ILEC, as well as resold services that are provided at avoided cost discounts that also vary from state-to-state and ILEC-to-ILEC.

In fact, USTelecom has not even attempted to make a credibly substantive case that takes into account the many factors that the Commission must weigh in order to grant a request for forbearance. Most important of these is the Section 160[6] requirement that the Commission "consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition."[7] As CALTEL will show, this determination is simply not possible or appropriate on a nationwide, all-markets, all-types-of-UNEs basis.

In the first section of these comments, CALTEL will address USTelecom's request to eliminate access to UNEs and resale at wholesale rates (*i.e.*, an avoided cost discount). CALTEL will begin by describing the role that UNEs play in the communications markets in California. CALTEL will rely on the highly confidential data that AT&T and Frontier have produced in this proceeding since that data appears to be a

[6] Section 10 of the Act is codified as 47 U.S.C. § 160.

[7] 47 U.S.C. § 160 (b): Competitive Effect to be Weighed.

fairly accurate and complete December 2017 snapshot of UNE loop counts and associated revenues.[8]

Next, CALTEL will describe how the trends and conclusions asserted by USTelecom in the Petition, and by USTelecom's economic experts in Appendix B, are counter to the reality in California. For example, using the same FCC reports and public data that USTelecom relied upon, the number of UNE loops provided by AT&T and Frontier in California not only did not decrease by more than half since 2005 as USTelecom claims is true for the nation, they actually *increased* by 15%. Moreover, California's percentage of the national total of UNE loops nearly doubled since 2005. And USTelecom's blanket dismissal regarding the use of UNEs to serve residential customers is not accurate in general, and certainly not for California.

Next CALTEL will summarize the determinations made by the California Public Utilities Commission ("CPUC") in its 2016 competition analysis regarding the role of UNEs. Two years later it is ironic to note that witnesses for some members of USTelecom, as well as legal briefs by the ILEC-cable-wireless coalition, relied heavily in that proceeding on an (overstated) assertion of an unfettered availability of UNEs in order to prop up their claims of robust and widespread competition.

[8] While this data appears to be generally accurate, it is by no means robust or granular in the same way as was the dataset that the Commission relied upon in the Business Data Services ("BDS") proceeding. Indeed, USTelecom on the one hand claims that this level of granularity allowed the Commission to "fashion a new regulatory regime that was tailored precisely to today's competitive realities" (*Petition* at p. 15) but fails to explain why that same level of robustness and granularity is not needed to support the Commission's analysis in this proceeding.

CALTEL will then turn to discussing what it believes should be a key factor in the Commission's consideration of the competitive impact of eliminating UNEs: *assessment of current barriers to deployment of last-mile fiber loops by non-cable competitive providers*. As the Commission has noted, streamlining access to utility poles is critically important to accelerating fiber deployment. It is true that the Commission has adopted a number of rule changes in recent days, months and years focused on that goal. But those rules do not apply in the 20 states like California that have "opted out"[9] of Commission regulation of pole attachments in their jurisdiction. And even though the CPUC determined in its competition decision that "competitive bottlenecks and barriers to entry, including lack of access to poles, conduit and other legacy network infrastructure, limit new entrants and may raise prices for some telecommunications services above efficiently competitive levels,"[10] and that a proceeding should be opened within nine months to address competitive access to poles and conduit, that 2017

[9] *See* Press Release, "FCC Speeds Access to Utility Poles to Promote Broadband, 5G Deployment", dated August 2, 2018, at https://docs.fcc.gov/public/attachments/DOC-353230A1.pdf .

[10] D.16-12-025, Decision Analyzing the California Telecommunications Market and Directing Staff to Continue Data Gathering, Monitoring and Reporting on the Market ("*CPUC 2016 Competition Decision*"), I.15-11-007, Order Instituting Investigation into the State of Competition Among Telecommunications Providers in California, and to Consider and Resolve Questions Raised in the Limited Rehearing of Decision 08-09-042 ("*CPUC 2016 Competition Proceeding*"), issued December 8, 2016 at Finding of Fact 24 (p. 189) at http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M171/K031/171031953.pdf .

proceeding has stalled and no meaningful updates to *wireline* pole attachment rules have been adopted since 1998.[11]

Finally, CALTEL will end its discussion of the UNE and resale forbearance request by discussing the state of copper retirement in California. As INCOMPAS has pointed out, the Commission's existing rules "incorporate a natural elimination of unbundling obligations" for DS0 loops.[12] ILECs are not obligated to unbundle fiber-to-the premises or fiber-to-the-home loops and can eliminate access to unbundled copper loops via the copper retirement process, which has recently been streamlined again.[13] As CALTEL discussed in its Wireline Broadband comments last year, AT&T and Frontier have chosen to retire only a handful of loops in California despite massive wildfires and other natural disasters. It must follow that the ILECs continue to find these facilities used and useful,[14] and prematurely cutting off CLEC access to UNE loops would create

[11] *See* D.98-10-058, issued October 22, 1998 ("*1998 ROW Decision*"). While it is true that the CPUC has updated the ROW rules several times in the past five years in order to extend access to CMRS providers, permit CLECs to attach wireless equipment, and to make a number of changes focused on improving pole safety, some of the safety-related decisions have actually made pole access more difficult for new attachers. In the *CPUC 2016 Competition Decision*, the CPUC recognized this fact, noting that "access to utility poles (is) where the Commission's safety mandate meets, and must be reconciled with, the Commission's goal of a competitive market." *CPUC 2016 Competition Decision* at p. 3. CALTEL also notes that it is not suggesting that pole access barriers do not exist in other states, including those which are not reverse-preempted.

[12] *Ex Parte* Letter of INCOMPAS, dated July 13, 2018, at p. 4 ("*INCOMPAS July 13 Ex Parte Letter*").

[13] *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Second Report and Order, released June 8, 2018 ("*Wireline Broadband Second Report and Order"*).

[14] CALTEL member Digital West reports that AT&T California is currently installing new copper facilities in new buildings under construction in the San Luis Obispo area.

incentives for the ILECs to squeeze more profits from their copper networks and disincentives to accelerate fiber deployment. Nonetheless, CALTEL's members are acutely aware of the imperative to deploy fiber before copper facilities are retired, as CALTEL's Executive Director explained to the CPUC in 2016.[15]

Finally, to the degree that the third of USTelecom's requests does not negatively affect non-discriminatory access to the poles, conduits and rights-of-way owned or controlled by AT&T California at just and reasonable rates pursuant to Section 251(b)(4), and to document the rates, terms and conditions governing that access in Section 252 agreements, CALTEL might ultimately determine that it does not oppose this request. However, as CALTEL discusses in more detail in the third section of these comments, the Petition lacks the information needed to understand the practical impacts that granting this request would have on the vitally important, currently challenging and far-from-streamlined state of competitive pole access in California. Moreover, the Petition relies on generalized pole ownership data that fails to account for the significantly high number of poles in California that are neither solely-owned by an electric utility or by an ILEC, but which are jointly-owned, and over which AT&T California exercises a great deal of control. For example, legacy pole attachment agreements with one of California's major

[15] Rebuttal/Supplemental Testimony of Sarah DeYoung on Behalf of the California Association of Telecommunications Companies, *CPUC 2016 Competition Proceeding*, dated July 15, 2016 at pp. 12-19 ("*DeYoung Competition Testimony*"). While testimony in this proceeding was officially admitted into the record, it is not available electronically on the CPUC's docket card. CALTEL has therefore made it and several other documents available on its website at http://www.caltel.org/cmsdocuments/DeYoung_Rebuttal_Supplemental_Testimony_Competition_OII__I.15-11-007_7-1.._(004).pdf .

electric utilities, PG&E, requires the first pole tenant in the communications space (in almost all cases AT&T) to manage all subsequent attachments in that space unless the new attacher opts to purchase grade and become a joint owner themselves. It is certainly unclear from USTelecom's cursory and high-level discussion if and how its forbearance request modifies these arrangements. And for the 20 "reverse preemption" states, of which California is just one, the Petition blithely assumes that the "analogous state requirements" that create "superseding mandates" to Section 224 provide the same protections as the Commission's Section 224 pole access regime and requirements.[16] As noted above, California's pole access rules have fallen significantly behind those of the Commission, and at the very least USTelecom must support its claims with additional state-specific information before the Commission should even consider granting this request.

II. DISCUSSION

A. UNEs and Section 251(c)(4) Resale Play an Important Role in Enabling Competition and Competitive Choice in California

1. Use of UNEs and Resale in California

There are two large, two mid-sized and 13 rural rate-of-return ILECs that operate in California. Competitive LECs like CALTEL's members may obtain a Certificate of Public Convenience and Necessity ("CPCN") to provide service in the territories of AT&T California, Frontier California (formerly Verizon California), Citizens California and Consolidated Communications of California. CLECs unfortunately are not permitted

[16] *Petition* at pp. 39 – 40.

to provide service in the operating territories of the 13 rural ILECs because the CPUC has not opened those territories to competition, as discussed in CALTEL's comments in the Wireline Broadband Deployment proceeding last year.[17]

Based on responses to information requests in the CPUC's 2016 competition proceeding, the two mid-sized ILECs are subject to the Section 251 unbundling rules but neither ILEC has been requested to offer UNEs. Resale from those two ILECs is also not subject to an avoided cost resale discount and none was ever arbitrated by the CPUC. These comments therefore focus on the UNEs and resold services that competitive providers obtain from AT&T and Frontier in California. CALTEL also notes that its members' use of UNEs and resold services is consistent with the information provided by INCOMPAS in its July 13, 2018 *Ex Parte* letter.[18]

a) 2-Wire (DS0) Loops

In California, CLECs utilize nearly half a million UNE loop arrangements, 93% of which are 2-wire bare copper DS0 loops that provide critical last-mile facilities to deliver competitive voice and broadband services to business and residential customers. DS0 loops can be used to provide POTS voice and high-speed broadband using VDSL2, ADSL2+ and Ethernet over Copper ("EoC") technologies. EoC services bond together

[17] Comments of CALTEL, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 ("*CALTEL Wireline Broadband Comments*"), dated June 15, 2017, at pp. 13-17.

[18] *INCOMPAS July 13 Ex Parte Letter*.

multiple DS0 loops and can be used to provide an integrated voice and high-speed data connection.

Customers benefit from the competitive choices offered by CLECs, which as INCOMPAS points out provide important incentives to ILECs and cable companies to deploy fiber and keep prices competitive. As discussed further below, CLECs like Sonic Telecom are using UNEs to do what the CPUC termed as "climbing the ladder of competition."[19] CALTEL described Sonic's evolution from an independent ISP to a gigabit fiber-to-the-home provider in its comments in the Wireline Broadband proceeding as well as in response to a petition to preempt a San Francisco building access ordinance, focusing on how Sonic's reliance on UNE loops has been key to fueling its deployment.[20]

Another CALTEL member, San Luis Obispo-based Digital West, utilizes DS0 loops to leverage its fiber network to provide business customers in surrounding rural areas (many of which are anchor institutions as well as wineries and other agricultural-based firms) with voice and high-speed broadband services that are otherwise not available from the ILEC or local cable company. Both Digital West and Sonic are aggressively pursuing expansion of their respective fiber networks, but as discussed further in Section A.4 below, are facing delays and constraints in attempting to gain access to utility poles.

[19] *CPUC 2016 Competition Decision* at p. 133, fn 344.

[20] *CALTEL Wireline Broadband Comments* at pp. 5-6. *See also* Comments of CALTEL and Declaration of Dane Jasper, In the Matter of Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council, MB Docket No.17-91, filed May 18, 2017.

CALTEL member TPx Communications uses DS0 loops to provide EoC broadband service to nearly 13,000 locations in California. The average TPx EoC customer orders 15 Mbps of Ethernet. TPx uses approximately 148,000 analog DS0 loops to provide local exchange service using ILEC UNE loops connected to TPx's nearly 300 collocations in ILEC central offices. Additionally, TPx's customers want local exchange service, typically referred to as Plain Old Telephone Service or POTS, in addition to voice and broadband for their fax and/or alarm services. There are no functionally equivalent substitutes to POTS for these services, in particular for alarm lines that guarantee continued availability and reliability of the alarm services. For example, copper lines do not require backup power for continued operations, while other alternatives (*e.g.*, wireless or fiber) require access to an independent power source.

DS0 loops are also used by CLECs to provide last-mile connection as well as turn-key finished services to other competitive providers, such as CALTEL member company BullsEye Telecom. For example, a Vice President of TPx Communications made a presentation to the CPUC last year that stated that TPx had 90 wholesale customers which were primarily served using UNEs.[21] The Davis Community Network, which describes itself as a nonprofit organization that provides internet-related services and support to local nonprofit organizations, discussed the downstream impact on its

[21] *See* Presentation of Kelsey M. Forsyth, TPx Communications, at CPUC Public Workshop: Copper Communication Facilities Usage in the IP Transition, December 6, 2017, at http://www.cpuc.ca.gov/general.aspx?id=6442455666 .

provider, an independent ISP that is itself a CLEC wholesale customer, as well as on Davis Community Network's end-user customers.[22]

AT&T reported that it provided BEGIN HIGHLY CONFIDENTIAL [redacted][23] END HIGHLY CONFIDENTIAL analog loops and BEGIN HIGHLY CONFIDENTIAL [redacted][24] END HIGHLY CONFIDENTIAL two-wire digital DS0 loops in California as of December 2017. Analog loops are most likely used for voice-only services, while digital loops can be conditioned to provide both voice and broadband over the same circuit. Due to the way that at least one of its members is ordering DSL-capable loops, CALTEL does not believe that the residential and business classifications in AT&T's data are accurate, and other data (such as Form 477s) should be relied on for additional information.

Frontier reported that that it provided BEGIN HIGHLY CONFIDENTIAL [redacted][25] END HIGHLY CONFIDENTIAL analog loops and BEGIN HIGHLY CONFIDENTIAL [redacted][26] END HIGHLY CONFIDENTIAL two-wire digital DS0 loops in California as of December 2017. Frontier did not provide any class of service classifications, and also did not separate out loop-and-transport Enhanced Extended Loops from strictly last-mile facilities.

[22] *Ex Parte* Letter of the Davis Community Network, dated June 7, 2018.

[23] *See* Appendix A for source documentation of Confidential and Highly Confidential information included in these comments.

[24] *Id.*

[25] *Id.*

[26] *Id.*

b) Loop and Transport Enhanced Extended Loops ("EELs")

CLECs utilize EELs at the DS0, DS1 and DS3 levels to provide voice and broadband services to business and residential customers served out of multiple central offices from a single switch.

AT&T reported that it provided BEGIN HIGHLY CONFIDENTIAL [redacted][27] END HIGHLY CONFIDENTIAL DS0 EELs and BEGIN HIGHLY CONFIDENTIAL [redacted][28] END HIGHLY CONFIDENTIAL DS1 and DS3 EELs in California as of December 2017.

As noted previously, Frontier did not separately report last-mile loop vs. loop-and-transport circuits.

c) DS1 and DS3 Loops

For the most part, CLECs that serve business customers bond together DS0 loops to provide voice and high-speed broadband services rather than relying on lower-speed UNE DS1 and DS3s. The data provided by AT&T and Frontier support this conclusion.

[27] *Id.*

[28] *Id.*

AT&T reported that it provided BEGIN HIGHLY CONFIDENTIAL [redacted][29] END HIGHLY CONFIDENTIAL DS1 loops and BEGIN HIGHLY CONFIDENTIAL [redacted][30] END HIGHLY CONFIDENTIAL DS3 loops in in California as of December 2017.

Frontier reported that that it provided BEGIN HIGHLY CONFIDENTIAL [redacted][31] END HIGHLY CONFIDENTIAL DS1 loops and BEGIN HIGHLY CONFIDENTIAL [redacted][32] END HIGHLY CONFIDENTIAL DS3 loops in California as of December 2017.

d) Interoffice Dark Fiber

Although total quantities may not be significant, the importance of interoffice dark fiber to provide backhaul and to connect last-mile and middle-mile networks of competitive providers together cannot be overstated. As INCOMPAS observes, "There are no economically viable alternatives to unbundled interoffice dark fiber transport…no comparable replacement exists for unbundled interoffice dark fiber transport."[33]

Both Sonic and Digital West utilize dark fiber unbundled dedicated transport ("UDT") to interconnect their entire networks (and the last-mile networks of their wholesale customers) in order to provide service to both urban and non-urban customers.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *INCOMPAS July 13 Ex Parte Letter* at pp. 2-3.

Sonic reports that all of its more than 70,000 on-net customers (served both by UNE and by self-deployed Gigabit fiber loops), as well as fiber-to-the-premises business customers that receive speeds up to 10 Gigabits, rely on 560 dark fiber UDT circuits. This includes service to rural areas; for example, Sonic uses UDT to provide middle-mile connections for customers served by Race Communications, the recipient of a grant from the CPUC to serve the previously underserved, heavily-forested, and very rural community of Occidental, California. And Digital West uses UDT to interconnect a number of central offices on California's central coast to serve customers, some of which otherwise have no broadband access. These include remote wineries, such as Clos Solene in Paso Robles, which is served via bonded DS1s, and the community surrounding Lake Nacimiento, which is served via DS0 sub-loops from a remote terminal that connects to the Paso Robles central office.[34]

AT&T reported that it provided BEGIN HIGHLY CONFIDENTIAL [redacted][35] END HIGHLY CONFIDENTIAL unbundled dedicated transport dark fiber strands in California.

Frontier did not provide any data regarding interoffice dark fiber transport.

[34] Facilities-based competitive providers in other states have also discussed the importance of dark fiber transport in recent *Ex Parte* letters. *See,* e.g., *Ex Parte* Letter of Uniti Fiber, dated July 13, 2018 (*"Uniti Fiber Ex Parte Letter").*

[35] *See* Appendix A.

e) Section 251(c)(4) Resold Services

Finally, although both AT&T and Frontier offer commercial wholesale platform agreements in California, wholesale platform customers like CALTEL member BullsEye Telecom utilize resale to provide features that are excluded in those agreements (*e.g.*, Centrex, ISDN, PBX, and BRI) or to deliver a more competitively-priced offering to low-usage and low- or no-feature requirement (e.g. measured, alarm, and fax) lines and business customers.

USTelecom incorrectly claims that "no transitional mechanism is necessary for Section 25l(c)(4) resale arrangements."[36] CLECs that rely on wholesale platform arrangements would be caught in the middle: on the one hand, they would have no leeway in negotiating mid-contract rate increases with their large business enterprise customers, and on the other hand, they would have no ability to make adjustments or negotiate changes to the take-it-or-leave-it commercial agreements with the ILECs. As a result, if the Petition is granted, it would immediately disrupt the ability of wholesale platform customers to fulfill contractual obligations, including the delivery of some features and functionality, to their end-user business customers.

Neither AT&T nor Frontier provided data regarding Section 251(c) resale.

2. Key Trends and Conclusions in the Petition and Appendix B Are Counter to The Reality in California

After reviewing the charts and data provided by USTelecom in the Petition, the confidential information provided by USTelecom to the Commission in its June 15th *Ex*

[36] *Petition* at p. 43, fn 133.

Parte letter,[37] and the highly confidential information provided by AT&T and Frontier to USTelecom's economic experts, CALTEL has determined that key trends and conclusions that might be accurate at an aggregated national level are exactly counter to the reality in California.[38]

a) In California, the Use of UNE Loops Increased Nearly 15% Between 2005 and 2013

First, one of the charts in the Petition (Chart 4) is provided to support USTelecom's assertion that "there are fewer than half as many unbundled network element (UNE) loops in use today as in 2005."[39] But one of AT&T's witnesses in the CPUC's 2016 competition proceeding provided a similar chart based on selected Form 477 data to support a completely contradictory assertion, that "AT&T California supplies more UNE loops today than it did in 2006." [40]

[37] *Ex Parte* Letter of USTelecom, dated June 15, 2018, Confidential Version.

[38] This conclusion is corroborated in the *Ex Parte* Letter of AT&T dated July 23, 2018, which stated that the confidential information it provided, [redacted] represents approximately one third of the UNE demand in its 22-state operating territory.

[39] *Petition* at p. iii. By "today", USTelecom meant year-end 2016 (Chart 4 at p. 16).

[40] Testimony of Dr. Debra J. Aron on Behalf of AT&T California, *CPUC 2016 Competition Proceeding*, dated June 1, 2016 at pp. 38-39 ("*Aron Competition Testimony*"). By "today" Dr. Aron meant year-end 2013. This testimony also is not available electronically on the CPUC's docket card and has been made available via a link posted to CALTEL's website at http://www.caltel.org/cmsdocuments/I1511007_-_Aron_Testimony_-_06-01-16.pdf .

Looking first at publicly-available state-specific data for the 2005-2016 time period, the Voice Telephone Services Reports, and before that the Local Telephone Competition reports, do not provide the number of UNE loop arrangements at the state level, but as AT&T's witness demonstrated, there is publicly available Form 477 Selected RBOC Local Telephone data for the 2005-2013[41] time period that does provide this information. As of December 2005, AT&T California reported that it provided 353,313 UNE loop arrangements and Verizon California (now Frontier California) reported an additional 90,856, for a total of **444,169**.[42] Comparing that to the most-recently publicly available Form 477 Selected RBOC data, as of December 31, 2013 AT&T California reported that it provided 424,385 UNE loop arrangements, and Verizon California reported an additional 81,817, for a total of **506,202**.[43] Therefore, the total of UNE loops in use in California between December 2005 and December 2013 *increased* by almost **15%**.

Looking at the period after 2013 requires relying on state-specific data that is not publicly available. CALTEL is hesitant to use the confidential data provided by AT&T

[41] The most recent data available in the Form 477 Selected RBOC data is December, 2013.

[42] *See* Form 477 Selected RBOC spreadsheet for December 31, 2005 at https://www.fcc.gov/general/form-477-selected-rboc-local-telephone-data , cells H4 and H41.

[43] *See* Form 477 Selected RBOC spreadsheet for December 31, 2013 at https://www.fcc.gov/general/form-477-selected-rboc-local-telephone-data , cells K8 and K28.

and Frontier in this proceeding, because it is not entirely clear that this data provides an apples-to-apples comparison to what AT&T and Frontier reported on their Form 477s.

b) The Percentage of UNE Loops in Use in California as Compared with the National Total Nearly Doubled Between 2005 and 2013

Moreover, this data shows that the percentage of UNE loops in use in California as compared to the national totals has increased as well:

- As of December 2005, California UNE loops (**444,169**) were **9.87%** of the total **4.5M**[44] national total.
- As of December 2013, California UNE loops (**506,202**) were **18.75%** of the total **2.7M**[45] national total.

c) In California, More Than 50,000 UNE Loops Are Used to Serve Residential Customers

Finally, USTelecom's assertion that "in the residential marketplace, competition will not be materially affected by forbearance from Section 251(c)(3) because there is effectively no remaining UNE-based competition in that marketplace...(T)o the extent CLECs serve residential customers using ILEC facilities, they do so on commercial platforms"[46] is simply not supported by the facts, even on a nationwide basis. Even in California, where CALTEL is aware that the residential/business classifications in

[44] *Petition* at Chart 4, p. 16.

[45] *Id.*

[46] *Petition* at pp. 27-28.

AT&T's highly confidential data are not accurate due to the way one of its members, Sonic Telecom, is populating a local service ordering field, the data shows BEGIN HIGHLY CONFIDENTIAL [redacted][47] END HIGHLY CONFIDENTIAL DS0 loops that are classified as residential.

Sonic reports that it leases 48,646 DS0 loops from AT&T California to serve residential customers in California, and that it also serves more than 25,000 customers over self-deployed Gigabit fiber-to-the-home loops. While this admittedly is still a very small percentage of total residential subscriptions in California (between 1-2%), it is also true that after adding Sonic's 48,646-line estimate to the figure above, approximately HIGHLY CONFIDENTIAL [redacted]%[48] END HIGHLY CONFIDENTIAL of the UNE loops provided by AT&T California are used to serve residential customers. Since USTelecom and its economic experts completely dismiss the existence of residential customers served over UNE loops, the California totals and percentages cannot be compared to any national numbers. However, *Ex Parte* letters from INCOMPAS and other parties indicate that residential customers in other states would be negatively impacted by the grant of the Petition as well.

d) In California, Resold Lines (Including Customers Served Using Wholesale Platform Commercial Agreements) Declined Between 2008 and 2013, But Significantly Less Than the National Total

[47] *See* Appendix A.

[48] *See* Appendix A.

Another of the charts in the Petition (Chart 6)[49] is used to support USTelecom's assertions regarding the use of Section 251(c)(4) resale and wholesale platform commercial agreements (UNE-P replacement products). Relying on the same data sources as described above, and for the years represented in Chart 6, CALTEL calculates that while the total number of resold and UNE-P/UNE-P replacement lines obtained from AT&T and Verizon in California has decreased approximately **28%** from **505,831** in December 2008[50] to **364,087** in 2013[51], that percentage is much smaller than the percentage decrease of the national total (**5,949,000** in 2008[52] vs. **3,851,000** in 2013[53], or **35.27**%). This shift also resulted in California's percentage of the total lines increasing during that period, from **8.50%** to **9.45%**.

e) California-Specific Trends and Data Demonstrate that UNE Forbearance Cannot Be Accurately Analyzed and Assessed at a Nationwide Level

[49] *Petition* at Chart 6, p. 18.

[50] *See* Form 477 Selected RBOC spreadsheet for December 31, 2008 at https://www.fcc.gov/general/form-477-selected-rboc-local-telephone-data , cells J8, J43 and L43. Based on CALTEL's knowledge about the transition from UNE-P to commercial wholesale platform arrangements in California, CALTEL believes that the number in cell L43 refers to how Verizon California reported those arrangements rather than being reflective of any large remaining quantity of regulated UNE-P.

[51] *See* Form 477 Selected RBOC spreadsheet for December 31, 2013 at https://www.fcc.gov/general/form-477-selected-rboc-local-telephone-data , cells J8 and J28.

[52] *See* Local Competition Reports for December 31, 2013 (lcom1213_tables.xls, Tab 5) at https://www.fcc.gov/general/local-telephone-competition-reports , cells F28 and H28.

[53] *Id.*, cells F38 and H38.

CALTEL is not suggesting that these trends and this data mean that the Commission should grant USTelecom's request in every other state except California. Rather, what it does demonstrate is that any UNE forbearance request that fails to take into account geographic as well as other market-specific factors makes it impossible for the Commission to make the competitive and economic assessments that it is required to make before granting any such request. The use of UNEs in California clearly runs counter to the trends and conclusions that USTelecom has cited, and for all CALTEL knows that is true in many other states, or in rural vs. urban areas, etc. USTelecom's Petition should be denied on that basis alone.

3. The CPUC's 2016 Competition Analysis Discussed the Role of UNEs and the Inter-relationship of Reliance on UNEs to Other Competitive Bottlenecks, Especially Access to Utility Poles

a) Access to UNEs

In November 2015, the CPUC issued an Order Instituting Investigation ("OII") to "gather information about the state of the telecommunications marketplace in California."[54] The OII further clarified the intent of the investigation as follows:

> To conduct this inquiry, we seek: (1) data related to competition in the retail and wholesale telecommunications markets in California; and (2) comment on existing reports and studies (including by the Commission's Communications Division) related to the price and availability of competing telecommunications services across California's diverse population, and its large and diverse geography. We undertake this investigation mindful of our obligation, pursuant to Public Utilities Code § 451, to ensure just and reasonable rates, terms and conditions of service. Accordingly, we request data and comment on these issues as an exercise in good government, and in light of our promise to monitor and inform ourselves about the State's telecommunications infrastructure. This data-

[54] *CPUC 2016 Competition Proceeding,* Order Instituting Investigation at p. 1.

driven approach does not reflect an intent to regulate where the Commission lacks regulatory authority.[55]

During the course of this proceeding, CALTEL's Executive Director Sarah DeYoung filed testimony that stated in part that "CALTEL member Sonic Telecom is deploying or has deployed an FTTP architecture to serve residential customers in Sebastopol, Brentwood and San Francisco"[56] and that "for CLECs like Sonic that serve residential customers, the only last-mile option other than deploying an FTTP architecture statewide is a two-wire UNE loop from the ILEC."[57] Ms. DeYoung also identified a forbearance petition such as the USTelecom Petition as a significant threat to the continued availability of UNE loops.[58]

The CPUC's final decision, D.16-12-025, discussed how CLECs like Sonic and other CALTEL member companies that have evolved from serving customers over leased

[55] *Id.* at pp. 1-2.

[56] *DeYoung Competition Testimony* at p. 10.

[57] *Id.*

[58] *Id.* at p. 19. The CPUC discussed Section 251 forbearance petitions in its final decision in this proceeding:

> "Public Utilities Code Section 716 requires the Commission to collect data on competition in any California metropolitan statistical area 'includ[ing] but not limited to, separate data on competitive options for residential, business, and wholesale services.' The Commission is required to do this in order to be able to timely file its views on any forbearance petition filed by incumbent carriers at the FCC asking for forbearance from their 'duty to provide … nondiscriminatory access to network elements on an unbundled basis.' Staff should issue a request for relevant data. In addition to carrying out our statutory mandate, improving our knowledge about the operation of the marketplace will improve our regulatory decision-making." *CPUC 2016 Competition Decision* at p. 164. *See also* pp. 176-179 and Conclusion of Law 5.

last-mile loops to self-deploying fiber loops are "climb(ing) the ladder of competition."[59] The Commission also noted that these CLECs, while relatively small in terms of market share, are important because "the question of whether new, facilities-based wireline companies can enter the market is a significant one, as it constitutes a test of the pro-competitive theory behind the 1996 Telecommunications Act and the URF decisions."[60]

Ironically, legal briefs for the ILEC-cable-wireless coalition, as well as testimony from some of their witnesses, overstated the availability and favorable terms and conditions of UNEs in order to prop up their claims regarding robust and widespread competition:

> The *URF Decision* recognized that facilities-based CLECs (non-cable CLECs using their own facilities and/or UNEs) compete with ILECs in the voice market and constrain ILECs' rates. *URF Decision* at 118, 133, 164. In doing so, the Commission relied on the availability of unbundled loops under the 1996 Act and of a replacement offering for the UNE platform provided at market-based rates. *Id*. at 118, 124-25, 133. Competition from CLECs remains an important market factor in 2016. AT&T California supplies CLECs with more total UNE loops (business and residential) today than it did in 2006, and CLEC use of the UNE-P replacement product has remained steady and even slightly increased in recent years.[61]
>
> UNEs today are ubiquitously available from ILECs under interconnection agreements, for both last-mile and middle-mile options, and CLECs also can (and do) use their own last-mile and interoffice facilities.[62]

[59] *CPUC 2016 Competition Decision* at p. 133, fn. 344.

[60] *Id.* at p. 65.

[61] Respondent Coalition's Opening Brief, *CPUC 2016 Competition Proceeding*, dated August 12, 2016, at p. 20.

[62] *Id*. p. 29.

One of AT&T's witnesses went even further in rebutting testimony of a witness for the Commission's Office of Ratepayer Advocates ("ORA"):

> **Q10. What is your concern with respect to Dr. Selwyn's treatment of CLECs as independent competitors?**
> A10. Dr. Selwyn asserts that CLECs selling wireline access services utilizing UNE-L or leased facilities should not be counted as competitors. (*Selwyn Reply Testimony*, p. 42, ll. 14-17.) In making this assertion, Dr. Selwyn treats the wholesale prices paid by CLECs as being unregulated. In fact, as the California Public Utilities Commission ("Commission") previously indicated, "[t]he prices for the UNE-L in California [were] set by this Commission at prices based on TELRIC studies of California-specific costs." Subsequent prices have been negotiated between ILECs and CLECs, and have been subject to Commission review. Dr. Selwyn thus overstates the degree of ILEC control over these prices and understates the degree of retail competition when he dismisses non-facilities based CLECs as competitors.[63]

CALTEL was therefore forced to address both the overstatements of the ILEC-cable-wireless coalition and the understatements of TURN and ORA:

> CALTEL believes that some parties have either overstated or understated the impact of the CLECs' role in order to support their policy goals in this proceeding. For example, as CALTEL's witness stated at the hearing, AT&T's responses about UNE loop prices left the misimpression that current rates were the result of a "blue-sky" negotiation between AT&T and CALTEL, implying that CLECs have much more bargaining power and control over those rates than is actually the case. In other instances, AT&T witnesses conflate the growing role played by CLECs as suppliers of wholesale inputs in business market segments with their minimal role as wholesale suppliers to the residential market. AT&T therefore appears to be motivated to overstate the presence and ability of CLECs to influence the market in order to support a finding that FCC unbundling policies continue to be one of two factors driving "sufficient future competition to discipline prices and obviate the need for traditional regulation."

[63] (Rebuttal)Testimony of Dr. Michael L. Katz on Behalf of AT&T California, *CPUC 2016 Competition Proceeding*, dated July 15, 2016 at pp. 5-6 ("*Katz Competition Testimony*"). This testimony also is not available electronically on the CPUC's docket card and has been made available via a link posted to CALTEL's website at http://www.caltel.org/cmsdocuments/ML_Katz_CPUC_OII_15_JULY_2016_Testimony_FINAL.pdf .

> Conversely, witnesses for TURN and ORA at times understate the benefits of FCC unbundling policies to CLECs and CLECs' presence in retail markets, or at the very least, fail to distinguish between the much different roles played by CLECs in business vs. residential markets. For example, ORA witness Dr. Selwyn completely dismisses all retail services offered by CLECs as providing any kind of effective competition, as does TURN's Professor Roycroft (but to a lesser degree). These parties seem motivated by a desire to have the Commission arrive at the opposite conclusion as AT&T with regard to FCC unbundling policies.
>
> The truth is more nuanced. To address these gaps and misimpressions, CALTEL served the Rebuttal/Supplemental Testimony of Sarah DeYoung, dated July 15, 2016, which primarily sought to supplement the record with regard to access to wireline wholesale inputs, specifically last-mile loops. As Ms. DeYoung stated in her testimony:
>
> > However, I do believe that the record with regards to UNEs is inadequate, especially with regards to two-wire copper circuits (loops) leased by CLECs to connect their networks to the premises of their residential and business customers. In the URF decision, the Commission found these loops to be a "major bottleneck to local telephone competition," and as I will explain further, this continues to be the case. Nonetheless, for a number of regulatory, technical and economic reasons, continued access to local loops is increasingly uncertain even though there is still no comparable substitute for this critical wholesale input.[64]

With the filing of the USTelecom Petition, that uncertainty, and the pressure on non-cable facilities-based CLECs like Sonic to accelerate deployment of fiber loops (which require attaching equipment to utility poles), has increased exponentially.

b) Access to Utility Poles

Importantly, the CPUC also determined that self-deployment of fiber loops to transition from reliance on UNE loops is hampered by barriers from other competitive bottlenecks, especially non-discriminatory access to utility poles:

[64] CALTEL Opening Brief, *CPUC 2016 Competition Proceeding*, dated August 12, 2016, at pp. 6-8.

> Competitive bottlenecks and barriers to entry in the telecommunications network limit new network entrants and may raise prices for some telecommunications services above efficiently competitive levels. One particular bottleneck is access to utility poles, where the Commission's safety mandate meets, and must be reconciled with, the Commission's goal of a competitive market.[65]

In order to address this finding, the CPUC committed that "within nine months of this order, the Commission shall institute a Rulemaking to examine telecommunications access to poles, conduit, and rights of way."[66] Although the CPUC met this commitment by opening a consolidated Order Instituting Investigation and Order Instituting Rulemaking ("OII/OIR") in June 2017, little to no progress has been made on competitive pole access issues for wireline providers in the past 13 months. And as CALTEL discusses next, no matter how many rule and process changes are adopted by this Commission to streamline pole access and accelerate fiber deployment, those improvements provide no relief to competitive providers in the twenty states that have "opted out" of Commission regulation of pole access in their jurisdictions.

4. State-Specific Barriers to Deployment of Last-Mile Fiber Loops Is a Key Factor in Determining the Competitive Impact of Eliminating UNEs

The CPUC issued its initial rules governing access to poles, conduits and rights-of-way in 1998. Except for revisions that addressed access by CMRS providers, that

[65] *CPUC 2016 Competition Decision* at p. 3.

[66] *Id*. at Ordering Paragraph 5, at p. 193.

permitted CLECs to attach wireless equipment to poles, and a number of changes to improve pole safety, the 1998 rules have not been updated.[67]

On June 29, 2017, the CPUC opened a consolidated investigation and rulemaking to address pole access and related safety and integrity issues:

> We open this proceeding to consider strategies for increased and non-discriminatory access to poles and conduit by competitive communications providers, the impact of such increased access on safety, and how best to ensure the integrity of the affected communications and electric supply infrastructure going forward. In pursuit of these goals, we will investigate the feasibility of a data management platform that would allow stakeholders to share key pole attachment and conduit information. On a parallel track, we will consider rules that would allow broadband Internet access service (BIAS) providers to attach facilities to poles and to use conduit following their classification as public utility telecommunications carriers in the FCC's 2015 Open Internet Order. We will also consider rules specific to conduit, and better pole management practices.[68]

The OII/OIR reiterated the CPUC's identification of pole access as a competitive bottleneck, and of the need to improve access to promote competition and competitive choice:

> Competitive carriers like Sonic and Google Fiber/Webpass have complained about difficulties they have experienced in trying to attach to poles and access underground conduit. As we found in our recent decision on competition in the telecommunications market, lack of ready pole and conduit access can be a barrier to increased competition in the communications market. Cable, broadband, and other competitive carriers have stated that their access to poles is slowed by inadequate information from, or inordinate delay by, pole owners. Lack of access to this infrastructure limits competition in the communications market, in turn

[67] As noted previously, some of the safety-related decisions have actually made pole access more difficult for new attachers.

[68] Order Instituting Investigation Into the Creation of a Shared Database or Statewide Census of Utility Poles and Conduit and Order Instituting Rulemaking Into Access by Competitive Communications Providers to California Utility Poles and Conduit, Consistent with the Commission's Safety Regulations, I.17-06-027/R.17-06-028 (*CPUC 2017 Consolidated Pole Proceeding"*), issued July 10, 2017, at p. 1.

> causing higher prices for consumers and diminished economic vitality for California. For that reason, we committed in our competition investigation to "institute a Rulemaking to examine telecommunications access to poles, conduit, and rights of way."[69]

The 2017 consolidated proceeding got off to a promising start with a round of comments in August and September of last year. The Administrative Law Judge and Assigned Commissioner scheduled a Pre-Hearing Conference in early December, and in response to their request for specific examples of competitive access problems, CALTEL attached an issue list to its pre-hearing conference statement.[70]

The following month a ruling was issued requesting additional input regarding the development of a statewide pole database. In early February, CALTEL filed comments on the ruling, urging the Commission to prioritize and address competitive access issues:

> As CALTEL has stated in the past, most recently in its Prehearing Conference Statement dated November 30, 2017, and at the December 5, 2017 Prehearing Conference, CALTEL believes that the database being proposed by the Commission could someday be useful to address issues and concerns that competitive providers encounter in gaining access to utility owned poles and conduits. However, CALTEL members currently are continuing to experience urgent and ongoing data and process issues that are impeding broadband deployment and competitive access to poles and conduits today. CALTEL briefly described some of the specific access issues that its members are facing in an attachment to its Prehearing Conference Statement. An updated version of this list is attached to these comments (Attachment 1). CALTEL has characterized these issues as "low hanging fruit" that are amenable to solutions that the Commission could and should address and implement in parallel with database efforts.[71]

---

[69] *Id*. at p. 4.

[70] CALTEL Prehearing Conference Statement, *CPUC 2017 Consolidated Pole Proceeding*, dated November 30, 2017, at Attachment 1.

[71] CALTEL Comments on the Assigned Commissioner and Assigned Administrative Law Judge's Ruling Requesting Comments on Creation of Shared, Statewide Database of Utility Pole and Conduit Information, *CPUC 2017 Consolidated Pole Proceeding*, dated February 8, 2018, at p. 1 and Attachment 1.

In order to jump-start progress on competitive access issues, CALTEL also joined with the Investor-Owned Utilities ("IOUs"), ILECs, and CTIA in a motion filed that same week requesting that the Assigned Commissioner and Administrative Law Judge "establish a scope and schedule for stakeholder collaborative workshops in this proceeding" that would focus on "identification by all stakeholders of specific, actionable objectives within the scope of this proceeding."[72] In CALTEL's view, these "specific, actionable objectives" would include proposals for streamlining pole and conduit access processes and procedures, as well as shorter-term initiatives that would increase mechanized access to pole and conduit data. And as CALTEL explained to the CPUC, while CALTEL does not anticipate that all its access issues would be resolved with pole owners through collaborative workshops, they appear to be the most effective and efficient approach to begin addressing these issues.

That bilateral motion was filed on February 5, 2018 and has still not been acted on by the CPUC. No scoping memo and schedule has been issued for this phase of the rulemaking, although several Public Participation Hearings focused on the proposed database were held in April and May. On May 15, CALTEL filed a motion requesting official notice of the filing of the USTelecom Petition and of the CPUC's own

[72] Joint Motion of AT&T, Bear Valley Electric Service, a Division of Golden State Water Company, the California Association of Competitive Telecommunications Companies ("CALTEL"), CTIA, Frontier, PACIFICORP, Pacific Gas and Electric Company, San Diego Gas and Electric Company, Southern California Edison Company, and Southern California Gas Company To Set Collaborative Workshops, *CPUC 2017 Consolidated Pole Proceeding*, dated February 5, 2018, at p. 1.

determinations in the competition decision regarding the inter-relationship between reliance on UNEs, deployment of fiber loops, and competitive access to utility poles.[73] The Administrative Law Judge and Assigned Commissioner have not acted on this motion either.

Meanwhile, beginning in 2011 and continuing to the present, this Commission has focused on updating its pole access rules to, among other things, streamline application timelines, reduce the time and costs associated with make-ready processes, and to strengthen enforcement procedures and remedies. Just last week the Commission adopted a One-Touch-Make-Ready ("OTMR") process that seeks to dramatically improve competitive pole access for competitive providers in the 30 states that are subject to the Commission's regulations. But in the 20 reverse-preemption states like California, this relief is not available to competitive providers unless and until similar processes are adopted by the relevant state commission.

CALTEL hopes that the CPUC's consolidated proceeding gets back underway very soon. CALTEL is also mindful of the serious threats posed by wildfires and other natural disasters in California, and of the CPUC's obligations to balance improved competitive access with concomitant safety and infrastructure integrity risks. Nonetheless, without improved pole access, non-cable competitive providers are hampered in deploying fiber loops and in transitioning off of last-mile circuits provided as UNEs.

[73] CALTEL Motion To Take Official Notice, *CPUC 2017 Consolidated Pole Proceeding*, dated May 15, 2018.

USTelecom makes blanket assumptions and conclusions about the ability and incentive of competitive providers to self-deploy fiber loops that fails to take any fiber deployment barriers into consideration, let alone state-specific ones. Its argument appears to be that (1) competition from cable and wireless providers has rendered the market sufficiently competitive that there is no need to consider the impact of eliminating non-cable or wireless competitive providers that are still relying on UNEs[74] and (2) over-reliance on low-priced UNEs is the only factor preventing competitive providers from accelerating deployment of fiber loops.[75] In other words, USTelecom essentially claims "they could if they would," whereas CALTEL's advocacy before the CPUC shows that the opposite is true.[76]

In conclusion, there are many factors that the Commission must consider in order to meet its statutory requirement to weigh the competitive effect of the Petition. That

[74] *See*, e.g., *Petition* at p. iv ("Because of robust intermodal competition, the marketplace is irrevocably open to competition, such that these obligations are no longer necessary to ensure that rates and practices are just, reasonable, and nondiscriminatory, or to protect consumers." *See also* pp. 8-11, including Charts 1-3.

[75] *Id.* ("Moreover, forbearance furthers the public interest by encouraging facilities-based competition, reducing compliance costs, and freeing capital for use in deploying broadband networks and advanced services to consumers.") *See also* pp. 23 and 32, which both suggest that overreliance on artificially low UNE rates is the only factor preventing competitive providers from deploying fiber.

[76] *See also Uniti Fiber Ex Parte Letter* ("Uniti Fiber already faces numerous barriers when deploying network infrastructure including, but are not limited to, state and local permitting and regulatory delays, physical barriers to deployment like waterways where local departments of transportation prevent us from attaching to bridges and other infrastructure, and expensive and time-consuming challenges with many railroads to undertake deployments even at public rights-of-way crossings. A loss of unbundled network elements, or a significant increase in the rates that we pay for such network inputs, would needlessly add additional time, cost and delay to an already difficult network deployment environment.").

effect must not simply be neutral—the regulatory changes sought must "promote" and "enhance" competition. And despite the Petition's all-markets, all-UNEs scope, that effect will be different depending on geography, market segment, and market-specific availability of replacement products. CALTEL contends that an assessment of barriers to fiber deployment is also a key factor, and with respect to the issue of pole access, one that cannot be accomplished without analyzing pole access rules and regulations at the state level.

5. The Commission's Existing Rules, Including Rules Governing Copper Retirement, Incorporate a Natural Elimination of Unbundling Obligations for DS0 Loops

In its July 13, 2018 *Ex Parte* letter, INCOMPAS described how the Commission's existing rules, including those pertaining to the retirement of copper facilities, afford a "natural forbearance" that more effectively incentivizes fiber deployment by both ILECs and CLECs, and aligns with the actual timeline for transitioning off of copper last-mile loops:

> Lastly, we discussed the fact that the existing UNE rules incorporate a natural elimination of unbundling obligations. For DS0 loops, there is no obligation to unbundle fiber-to-the premises or fiber-to-the-curb loops. Accordingly, ILECs can eliminate their DS0 unbundling requirements when they retire their copper loops. This "natural forbearance" built into the existing rules maintains comparative parity and incentivizes ILECs to speed up fiber deployment. At the same time CLECs also have incentive to deploy fiber rapidly; failure to build their own fiber networks by the time ILECs complete copper retirement would lock CLECs out of these markets and place them at a severe competitive disadvantage. In contrast, granting USTelecom's forbearance petition would remove a powerful incentive for all providers to deploy fiber, and only continue to encourage the disparity of next-generation broadband development in underserved markets. Without any unbundling or resale obligations, ILECs gain the ability to squeeze more profits from their existing copper networks, while simultaneously blocking CLECs from utilizing UNEs to push the ILECs (and cable) to improve their broadband

> services. Forbearance also expands the profitability of ILECs' existing copper networks by increasing their ability to impose substantial price increases in markets where CLECs, without access to UNEs and resale, no longer can offer competitive alternatives and are forced to withdraw.
>
> A nationwide hard deadline for full cessation of all UNE obligations, as suggested by USTelecom, creates similar problems. Though many competitive providers are investing in fiber deployment and building out their own facilities, a full transition away from copper and UNE-based services will take CLECs at least as long as it will take the ILECs. USTelecom's proposed transition period of less than three years falls woefully short; it is unlikely that the ILECs themselves could complete a full transition to fiber networks during that same time. Given the current deployment trajectory with ILECs and CLECs both racing to replace copper, a full nationwide fiber-speed deployment remains in the distant future, making this UNE forbearance extremely premature.
>
> …Rather than forcing a one-size-fits-all timeframe onto a diverse marketplace, the Commission should adhere to the "natural forbearance" under its current rules. In markets where ILECs have completed copper retirement, they gain full relief from DS0 unbundling obligations. In markets where ILECs have yet to discontinue copper, CLECs should be able to retain access to UNEs. This natural forbearance ensures that CLECs can continue providing consumers in underserved areas competitive alternatives to ILECs' copper services.[77]

CALTEL agrees. As CALTEL stated in its comments in the Wireline Broadband proceeding last year, California is one of the places where ILECs have retired only a handful of copper facilities:

> For Sonic and other California CLECs, the on-the-ground facts do not support a view that copper retirement notices are an everyday occurrence, let alone inevitable. CALTEL is simply unable to answer many of the questions in the NPRM because to date, CALTEL is aware of no copper retirement notices that have been filed by either AT&T or Frontier that have affected CLEC end-users in California. Since January 1, AT&T and Frontier have filed one retirement notice each for California. CALTEL assumes this is because copper facilities remain used and useful to the ILECs, either to serve their own retail customers or as a source of desirable wholesale revenue. In the face of these facts, it is difficult to

[77] *INCOMPAS July 13 Ex Parte Letter* at pp. 4-5.

believe that the Commission's (or the CPUC's) copper retirement rules present any real barrier to fiber deployment.[78]

Nonetheless, CALTEL supported many of the Commission's proposals to streamline copper retirement notices, a fact reflected in the Commission's decision.[79] And in the intervening months since filing these comments, CALTEL is only aware of a single copper retirement notice in California, wherein AT&T noticed the need to replace facilities damaged in the Northern California wildfires last fall. It is CALTEL's understanding that Sonic had customers impacted by that notice but was able to make alternate arrangements without delaying AT&T's plans or incurring loss of service for those customers.[80]

CALTEL also explained in its comments last year that although the CPUC has adopted copper retirement rules that differ slightly from those of the Commission, those rules do not present a serious impediment to the retirement of copper facilities in California.[81] Neither AT&T nor Frontier stated otherwise in either their comments or reply comments.

Given this status quo, eliminating the ability of CLECs to access DS0 copper loops in California, where virtually none have been retired and are still presumably being

[78] *CALTEL Wireline Broadband Comments* at pp. 6-7.

[79] *See,* e.g., *Wireline Broadband Second Report and Order* at p. 29, fn 241 and at p. 31, fn 259.

[80] AT&T Public Notice of Copper Retirement Under Rule 51.332, dated February 8, 2018 at https://ecfsapi.fcc.gov/file/10208106089281/ATT20180129C.1%20Copper%20Retirement%20February%208%2C%202018%20FINAL.pdf .

[81] *CALTEL Wireline Broadband Comments* at pp. 20-21.

used by the ILECs, would have all the negative incentives and disincentives described by INCOMPAS. Sonic and other facility-based CLECs would have diminished revenue to fuel fiber deployment and would still be facing pole access and other barriers that gate that fiber deployment. Meanwhile, AT&T and Frontier would no longer need to meet competitive pressure from CLEC fiber-based services and would be motivated to squeeze profits out of their legacy copper-based services. It is hard to see how this outcome would support the Commission's goals or ultimately would be in the public interest.

Finally, CALTEL in no way intends to suggest that its members do not take seriously the imminence or inevitability of losing access to copper facilities. In testimony in the CPUC's 2016 competition proceeding, CALTEL's Executive Director included copper retirement as a primary threat to continued access to copper last-mile facilities (and also predicted the filing of Section 10 forbearance petitions, although not at a nationwide level).[82] As described above, CLECs are acutely aware of the regulatory uncertainty regarding DS0 loops, and are racing to overcome significant barriers in order to deploy fiber and offer innovative, high-speed services to residential and business customers in California. And AT&T and Frontier are free to retire copper facilities pursuant to the Commission's rules in California, but until they do so, those facilities should continue to be available to CLECs and ILECs alike.

B. More Information is Needed to Assess the Impacts of USTelecom's Request for Forbearance from the Obligations of Section 271(c)(2)(B)(iii)

[82] *DeYoung Competition Testimony* at p. 10.

CALTEL is not sure what to make of USTelecom's third forbearance request. On the one hand, it seems to pertain to a Section 271 RBOC competitive checklist obligation that is obsolete and no longer meaningful. On the other hand, USTelecom bewilderingly claims that complying with this requirement "drains valuable compliance time and resources from the budgets of RBOCs (and RBOCs alone)."[83] Yet no information is provided regarding what burdensome compliance activities are being performed. Furthermore, USTelecom states that these requirements are duplicative of the obligations of all pole owners contained in Section 224, or in reverse-preempted states like California, by "analogous state requirements."[84] As a result, CALTEL is not sure what the practical effect of granting USTelecom's request would be.

To the degree that this request does not negatively affect non-discriminatory access to the poles, conduits and rights-of-way owned or controlled by AT&T California at just and reasonable rates pursuant to Section 251(b)(4), and to document the rates, terms and conditions governing that access in Section 252 agreements, CALTEL might ultimately determine that it does not oppose this request. However, any changes to pole attachment arrangements in the currently challenging pole access environment in California would be extremely disruptive and create a double-whammy (when combined with the elimination of UNEs) for competitive providers attempting to accelerate fiber deployment.

[83] *Petition* at p. iv. *See also* p. 43.

[84] *Id.* at p. 39.

For example, it is CALTEL's understanding that in northern California a legacy pole attachment agreement between the electric utility, PG&E, and AT&T creates an obligation for the first attacher in the communications space (almost always AT&T) to manage the applications of other attachers in exchange for undisclosed benefits and concessions. CLECs that wish to attach to poles in PG&E's service territory therefore have an option to become tenants of AT&T or to join the Northern California Joint Pole Association ("NCJPA") and directly purchase grade and become a pole owner. In another part of the state the electric utility, San Diego Gas and Electric, solely owns all of its poles and requires all communications attachers to lease space from it (or to erect their own poles).

That is why the generalized pole ownership data in the Petition is difficult to fathom. It is hard to understand what USTelecom means when it claims that ILEC pole ownership numbers are declining. Is USTelecom referring only to poles that are either solely owned by the ILEC or by the electric utility? What about the majority of poles in PG&E's and Southern California Edison's service territories that are jointly-owned? As described above, AT&T California exercises a great deal of control over a significant number of poles, and it confirmed this fact earlier this year when it told the CPUC that "in 2017, AT&T alone received applications to add or modify 26,000 pole

attachments."[85] "Symmetrical regulation"[86] is hardly justified given these facts and state-specific circumstances.

USTelecom's claims regarding the protections afforded by "analogous state requirements" that create "superseding mandates"[87] to Section 224 are similarly vague and unsupported. In the case of California, as described above, wireline pole access rules have not been updated since 1998 and have fallen significantly behind those in Section 224, including the enforcement procedures that USTelecom specifically cites.[88]

If USTelecom is interested in pursuing this request, it must support its claims with more information about the state-specific practical effects if the request were to be granted, clarification of the pole ownership data it claims to be relevant, and much more detailed and state-specific analysis regarding the "analogous state requirements" that it asserts the Commission should rely upon.

III. CONCLUSION

For the reasons stated above, the Commission should reject USTelecom's request to eliminate continued access to UNEs and Section 251(c)(4). With regard to UNE loop arrangements and dark fiber transport, that action is premature, unsupported with data

[85] Comments of AT&T on January 11, 2018 Assigned Commissioner and Assigned Administrative Law Judge's Ruling, I.17-06-027/R.17-06-028, dated February 8, 2018, at p. 4.

[86] *Id.* at p. iv.

[87] *Id.* at pp. 39-40.

[88] *Id.* at p. 40.

that demonstrates that trends and conclusions are indeed consistent nationwide, inconsistent with the Commission's fiber deployment goals, and unnecessary in light of the already-existing ability of ILECs to discontinue unbundling obligations for DS0 loops via the Commission's copper retirement rules. With regard to Section 251(c)(4) resale, that action is unsupported with data that demonstrates that trends and conclusions are indeed consistent nationwide and would immediately disrupt the ability of wholesale commercial platform customers to fulfill contractual obligations, including the delivery of some features and functionality, to their end-user business customers. The Commission should also reject USTelecom's request to forbear from the obligations pursuant to Section 271(c)(2)(B)(iii) unless more information is provided.

Respectfully submitted,

Sarah DeYoung
Executive Director, CALTEL
50 California Street, Suite 1500
San Francisco, CA 94111
Telephone: (925) 465-4396
Facsimile: (877) 517-1404
Email: deyoung@caltel.org

Stephen P. Bowen
Bowen Law Group
19660 North Rim Drive, Suite 201
Surprise, AZ 85374
Telephone: 415-394-7500
Facsimile: 415-394-7505
Email: steve.bowen@bowenlawgroup.com
Counsel for CALTEL

August 6, 2018

Appendix A

[Redacted]